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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,
Petitioner,
v.
P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,
and
UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF U.S. SENATORS ORRIN G. HATCH, STROM THURMOND, CHARLES E. GRASSLEY, ALFONSE M. D'AMATO, ROBERT F. BENNETT, JAMES M. INHOFE, AND RICK SANTORUM, AND REPRESENTATIVES JAMES V. HANSEN AND CHRISTOPHER CANNON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, to the extent it applies to the States, is a constitutional exercise of Congress' power under the Fourteenth Amendment.

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INTEREST OF *AMICI CURIAE*

Amici are United States Senators and Representatives who seek to preserve and protect *both* of the fundamental constitutional and political values at issue in this case: religious freedom and federalism. Some of these *amici* were sponsors of the Religious Freedom Restoration Act. That Act was expressly designed to "enforce" the Free Exercise Clause of the First Amendment (as incorporated by the Fourteenth) by creating a limited, statutory protection for religious freedom. That statute is within Congress' power under the plain meaning of Section 5 of the Fourteenth Amendment, and therefore does not depend for its validity upon the sweeping (and incorrect) view of congressional authority suggested by portions of the majority opinion in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

The purposes of this brief are to explain why the Act does not transgress the constitutional separation of powers; why the enactment of RFRA is within Congress' authority under an appropriately narrow reading of Section 5; and why the Court should reject the broader theories of congressional power that some might invoke in an effort to sustain the Act.[1]

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Religious Freedom Restoration Act ("RFRA" or "the Act") is a proper and facially valid exercise of Congress' legislative power. First, contrary to petitioner's mischaracterization, the statute does not run afoul of the constitutional separation of powers by dictating the standard courts must apply in determining whether government action violates the Free Exercise Clause. Both the Senate and the House reports on RFRA make clear that Congress was merely

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[1] Pursuant to Rule 37 of this Court's Rules, the parties have consented to the filing of this brief in letters that have been filed with the Clerk.

"creat[ing] a new *statutory* prohibition," and that the Act "does not purport to set the standard of review to be applied by the . . . courts in cases brought under [any] constitutional provision." S. Rep. No. 103-111, at 14 n.43 (1993) (hereinafter "S. Rep."), *reprinted in* 1993 U.S.C.C.A.N. 1892; see also H.R. Rep. No. 103-88, at 6-7 (1993) (hereinafter "H.R. Rep."). RFRA also does not transgress any of the limitations on Congress' power articulated by this Court in *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995).

Second, the Act is a valid exercise of Congress' power, under Section 5 of the Fourteenth Amendment, to "enforce" the "provisions" of that Amendment through "appropriate legislation." U.S. Const. amend. XIV, § 5. To be sure, petitioner and its *amici* are correct that this power is limited, and cannot properly be construed as broadly as suggested in the alternative holding in *Katzenbach* v. *Morgan*. However, that power also is not so narrow as to be essentially redundant of the judiciary's own (implied) power to enforce the Fourteenth Amendment, *i.e.*, a mechanism by which to apply the Amendment's prohibitions in individual cases. In 1866, the word "enforce," particularly when applied to actions of the legislative branch, meant to "strengthen" or "fortify," not only to "effectuate" or "carry out."

The key to understanding the scope of Congress' power under Section 5 is to recognize that the word "appropriate," as applied to legislation, was a well-established term of art in 1866. See, *e.g.*, *Molzof* v. *United States*, 502 U.S. 301 (1992) (term of art to be construed in accord with its established meaning). As defined by Chief Justice Marshall in *McCulloch* v. *Maryland*, 17 U.S. 316 (1819), an "appropriate" legislative means is one which is "plainly adapted" to further a legitimate end that is "within the scope of the Constitution"; which "directly and necessarily tends" to produce that result; and which is not otherwise "prohibited" by the Constitu-

tion. Id. at 421; accord *Ex Parte Virginia*, 100 U.S. 339 (1879) (similar definition).

RFRA satisfies these requirements. Contrary to petitioner's argument, RFRA is not "prohibited" by the Establishment Clause, for reasons explained at length in briefs filed by the respondents. And the end RFRA seeks to promote—protecting the right to free exercise of religion—is obviously "within the Constitution." That right is expressly enshrined in the First Amendment, which has been applied to the States through the Fourteenth Amendment (in accordance with the understanding of those who framed the Fourteenth Amendment). Accordingly, RFRA does not depend for its validity upon *Morgan's* incorrect suggestion that Congress has discretion, not only to select the means to be used in enforcing a requirement imposed by the Fourteenth Amendment, but also to determine for itself what requirements that Amendment imposes. To recognize such a sweeping power would be to give Congress the power, in essence, to amend the Constitution without going through the process specified in Article V.

Further, the means chosen in RFRA for enforcing the Free Exercise Clause are "appropriate" within the meaning of Section 5, assuming (as we do) that this Court correctly identified the outer bounds of that Clause in *Employment Div.* v. *Smith*, 494 U.S. 872 (1990). To be sure, RFRA goes beyond what the Free Exercise Clause requires of its own force (as interpreted in *Smith*). But RFRA is no different in that regard than the statutes at issue in such decisions as *Ex Parte Virginia*, 100 U.S. 339 (1879); *City of Rome* v. *United States*, 446 U.S. 156 (1980); and *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), all of which were upheld by this Court even though they went somewhat beyond the minimum that (arguably) would have been necessary to compel compliance with the relevant constitutional prohibitions. Again, on this crucial issue, the test is not whether RFRA

is indispensably necessary to the achievement of its goal, but whether the statute is "plainly adapted" to protecting the constitutional right to free exercise of religion, and "directly tends" to produce that result.

RFRA amply satisfies this requirement. *Smith* itself recognized that the Free Exercise Clause prohibits the enforcement of State laws that, surreptitiously or otherwise, "punish the expression of religious doctrines [the government] believes to be false, . . . impose special disabilities on the basis of religious views or religious status," or that regulate or ban "physical acts or abstentions . . . only because of the religious belief that they display." 494 U.S. at 877. By potentially requiring governments to justify, under a "compelling interest" test, the application of any challenged law that imposes a substantial burden on religious exercise, RFRA directly and substantially deters governments from violating these prohibitions. This Court's decisions upholding statutes in other contexts, moreover, demonstrate that this test is an especially effective and proven device for remedying government action that *surreptitiously* violates such prohibitions through seemingly "neutral" laws. In short, RFRA is a facially valid exercise of Congress' Section 5 power.

ARGUMENT

The Religious Freedom Restoration Act is based upon one of the core values underlying the Bill of Rights, namely that "the right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American." S. Rep. at 4. Indeed, Congress enacted RFRA as a means of enforcing the express constitutional guarantee of free exercise of religion. Id. at 14 n.43. To accomplish that end, Congress designed RFRA as a 'statutory prohibition on governmental action that substantially burdens the free exercise of religion" (id.) unless that action is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000bb-1(b). As we now demon-

strate, RFRA does not violate the separation of powers, and otherwise falls comfortably within Congress' authority under Section 5 of the Fourteenth Amendment.

I. THE RELIGIOUS FREEDOM RESTORATION ACT DOES NOT VIOLATE THE CONSTITUTIONAL SEPARATION OF POWERS.

The rhetorical core of petitioner's argument is that it was the *Smith* decision that prompted Congress to pass RFRA, and that certain legislators (as well as the President) loosely—and incorrectly—described the statute as "overturning" or "reversing" that decision. But these facts do not make RFRA unusual, or in any way establish a violation of the separation of powers doctrine.

Congress often enacts legislation in response to decisions of this Court interpreting the Constitution, and sometimes in ways that are characterized as "overturning" those decisions. Yet RFRA is not an attempt to reinterpret the Free Exercise Clause of the Constitution any more than these other statutes represent reinterpretations of the Constitution. This was clearly recognized by Rep. Henry Hyde, a sponsor of the Act who at one point characterized the statute as "overturning" *Smith,* but then clarified that comment as follows:

> Of course, the label restoration is inappropriate in this context since the Congress writes laws—it does not and cannot overrule the Supreme Court's interpretation of the Constitution. We are unable to restore a prior interpretation of the first amendment.

139 Cong. Rec. H2357-58 (daily ed. May 11, 1993). And any suggestion that Congress was attempting to supplant this Court as the arbiter of constitutional interpretation is unambiguously refuted by the Senate report, which states:

> While the act is intended to enforce the right guaranteed by the free exercise clause of the first amendment, it does not purport to legislate the standard

> of review to be applied by the . . . courts in cases brought under that constitutional provision. Instead, it creates a new statutory prohibition . . . ."

S. Rep. at 14 n.43.[2]

The Act also does not transgress any of the relevant limitations on Congress' Article I power articulated in *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995), or elsewhere. First, while *Plaut* made clear that Congress cannot pass statutes that prescribe the " 'rules of decision' " in pending cases, id at 1452 (quoting *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872)), the opinion also observed that Congress is permitted to " 'amend[] applicable law,' " id. at 1452-53 (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). That is all RFRA does. It does not prescribe the holding for any case pending before the courts. It does not compel particular findings of facts or specific results under preexisting law. See *Robertson*, 503 U.S. at 441. It also does not force the courts to decide future cases using a congressional interpretation of the First Amendment. RFRA simply makes new statutory law designed to enforce the Free Exercise Clause.

Second, *Plaut* also makes clear that Congress cannot reopen final decisions of Article III courts. 115 S. Ct. at 1453, 1454 n.4. RFRA does not attempt to change the result reached by this Court in the particular dispute at issue in *Smith*. Nor does RFRA direct the lower courts to reopen final decisions based on that decision. If Congress had done such a thing, it undoubtedly would have been unconstitutional: "A legislature, without exceeding its

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[2] It is also of no moment that the Act depends for its application on a burden on the "exercise of religion under the First Amendment to the Constitution." *Cf.* Pet. Br. at 20. Many statutory rights are triggered by a burden upon or violation of a constitutional right. *E.g.*, 42 U.S.C. §§ 1981, 1983. But no court decision of which we are aware has ever held that such a statute is unconstitutional for that reason.

province, cannot reverse a determination once made in a particular case." *The Federalist* No. 81, at 484 (Hamilton) (Rossiter ed., 1961). Nevertheless, the legislature "may prescribe a new [statutory] rule for future cases." Id. Once again, that is all Congress has done here.

II. RFRA IS AN APPROPRIATE EXERCISE OF THE NARROW LAWMAKING POWER GIVEN TO CONGRESS BY SECTION 5 OF THE FOURTEENTH AMENDMENT.

Having shown that RFRA does not contravene the constitutional separation of powers, we now demonstrate that the statute is within Congress' power under Section 5 of the Fourteenth Amendment. That section provides that Congress "shall have power to enforce, by appropriate legislation," the Amendment's provisions. U.S. Const. amend. XIV, § 5. Section 1, in turn, forbids the States to "abridge the privileges or immunities of citizens of the United States," to "deprive any person of life, liberty, or property without due process of law," or to "deny to any person within its jurisdiction the equal protection of the laws." Id., § 1. The fundamental questions raised by this aspect of the case are (1) whether, as petitioner and certain of its *amici* appear to contend, this power to "enforce" the Privileges or Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment is limited to that which is indispensably necessary to compel compliance with those guarantees and, if not. (2) what are the limits to this enforcement power? Once these two questions are answered, the specific issue here—whether RFRA falls within the Section 5 power—is easily resolved in RFRA's favor.

A. Although It Imposes Significant Limitations, Section 5 Gives Congress The Authority, Not Only To Compel States To Respect Legitimate Fourteenth Amendment Rights, But Also To Strengthen And Fortify Those Rights Under A Traditional "Appropriateness" Test.

We agree with petitioner and some of its *amici* that the power given to Congress under Section 5 includes significant limitations. See *infra* pp. 20-24. However, that power is not so narrow as to duplicate essentially the judiciary's implicit power to enforce the Fourteenth Amendment by applying its prohibitions in particular cases. Thus, Section 5 undoubtedly gives Congress authority to go beyond that which is minimally necessary to compel the States to comply with the requirements of Section 1, whether or not there has been an antecedent violation of those requirements. *Cf.* Pet. Br. at 26-27; Ohio, *et al.*, *Amicus* Br. at 12-14.

1. This is confirmed by three separate features of the constitutional language. *First*, like Section 2 of the Thirteenth Amendment, Section 5 uses the term "enforce," which is broader than alternatives the drafters could have chosen, such as "execute" or "compel compliance with." At the time Section 5 was drafted, the dictionary definition of "enforce" included not only "execute" and "put in force," but also "strengthen." Webster, *An American Dictionary of the English Language* 447 (1866); accord Johnson, *A Dictionary of the English Language* (12th ed. 1812) (defining enforce as, *inter alia*, "[t]o give strength to; to strengthen; to invigorate"). There is no indication that the Framers of the Fourteenth Amendment intended to limit or depart from this then-common understanding of the term "enforce." See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994) ("we construe a statutory term in accordance with its ordinary or natural meaning").

Second, this power to "enforce" is granted specifically to Congress, not to the judicial branch, the executive branch, or even some combination of the three branches.

Obviously, Congress' business is to draft and adopt legislation, not to decide "cases or controversies" (U.S. Const. art. III, § 2) or to "execute" the laws (U.S. Const. art. II, § 3), functions textually committed to the two other coequal branches of government. Accordingly, Congress could hardly be expected to "enforce" a law in the relatively narrow way that the Attorney General would enforce it in exercising her prosecutorial power, much less in the even narrower way that a court would be expected to enforce the requirements of the Amendment in a particular case.

Third, Congress was given power to enforce the Amendment through "appropriate legislation." While this phrase may sound imprecise to modern ears, in 1866 it was a term of art, one that would have evoked the early debates over the scope of Congress' implied powers (and Article I's Necessary and Proper Clause) and Chief Justice Marshall's resolution of that issue in *McCulloch.* Because "appropriate" was a term of art in 1866, it should be interpreted as it would have been understood at that time. See, *e.g., Molzof* v. *United States,* 502 U.S. 301 (1992) (citing other cases); *McDermott Int'l, Inc.* v. *Wilander,* 498 U.S. 337 (1991) (same).

As a term of art, the phase "appropriate legislation" had its genesis in the debate over Congress' implied powers, which began almost as soon as the Constitution was drafted and submitted to the States for ratification. *E.g., An Old Whig, No. 2* (1787), in 3 *The Complete Anti-Federalist* (Storing ed., 1981), reprinted in 3 *The Founder's Constitution* 239 (Kurland & Lerner eds., 1987); *The Federalist* No. 33, at 201-03 (Hamilton) (Rossiter ed., 1961); id. No. 44, at 283-86 (Madison). That debate became acute during the 1790-91 dispute between Thomas Jefferson, who was then Secretary of State, and Alexander Hamilton, the Secretary of the Treasury, over the constitutionality of legislation creating the first Bank of the United States. Jefferson argued that Congress possesses only those implied powers without which the gov-

ernment would be unable to carry out a particular function. 19 *The Papers of Thomas Jefferson* 270-80 (Boyd *et al.* eds., 1950), reprinted in 3 *The Founder's Constitution* 245-47. Hamilton, on the other hand, contended that Congress, in seeking to carry out its enumerated powers, possessed the implied power to use any means that "has a natural relation to any of the acknowledged objects or lawful ends of the government." 8 *The Papers of Alexander Hamilton* 97-106 (Syrett *et al.* eds., 1979), reprinted in 3 *The Founder's Constitution* 247-50. Thus, at its core, the debate turned on whether Congress had authority to adopt means that were "needful, incidental, useful, or conducive to" an express power, or only those means that were "absolutely or indispensably necessary" to the exercise of those powers. Id.

In *McCulloch*, this Court unanimously upheld Congress' power to charter a second Bank of the United States and, in so doing, rejected Jefferson's position on Congress' implied powers. The narrow issue was whether Congress had the implied power to create a corporation to carry out the Nation's business, inasmuch as the power to create corporations was not expressly granted by the Constitution. As framed by Chief Justice Marshall, the resolution of this issue depended upon whether, as the State of Maryland argued (echoing Jefferson), Congress had implied authority to do only that which was "indispensably necessary" to carry out one of its express powers, or whether, as Marshall put it, Congress had the power to choose an "appropriate means" (17 U.S. at 408, 410) to accomplish its goal, whether or not the chosen means was "indispensable" to the achievement of that goal.

To answer this question, Marshall reasoned that "[i]t must have been the intention of those who gave these [express] powers, to insure, as far as human prudence could insure, their beneficial execution." Id. at 415. "This could not be done," he opined, "by confining the choice of means to such narrow limits as not to leave it

in the power of Congress to adopt any which might be appropriate, and which were conducive to the end." Id. Marshall further reasoned that, in practice, Jefferson's position would create separation-of-powers problems: "[W]here the law is . . . really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." Id. at 423.

Based upon this reasoning, Marshall resolved the underlying issue in the following famous passage: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." Id. at 421. The Court also held that the Necessary and Proper Clause (U.S. Const. art. I, § 8, cl. 18) could not be construed as a further restriction on Congress' implied powers and, therefore, effectively held that the legitimacy of legislation under that Clause was subject to the same "appropriateness" test. Id. at 420-21.[3]

Though the opinion went out of its way to emphasize that Congress' implied power is subject to strict limits,[4] *McCulloch* ignited a firestorm of protest. This was especially true in Marshall's home state, Virginia, where his statements regarding Congress' power to enact "appropriate" legislation quickly became a lightning rod. The *Richmond Enquirer*, "the preeminent keeper of the states'

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[3] As Professor Black has pointed out, "Marshall does not place principal reliance on [the Necessary and Proper Clause] as a ground of decision; . . . he addresses himself to the necessary and proper clause only in response to counsel's arguing its *restrictive* force . : . ." Black, *Structure and Relationship in Constitutional Law* 14 (1969).

[4] For example Marshall warned that the Court would hold an act unconstitutional if Congress, "under the pretext of executing its powers, pass laws for the accomplishment of objects, not intrusted to the government." *McCulloch*, 17 U.S. at 423.

rights flame," began publishing a series of attacks on the decision within a month of its issuance. Gunther, *John Marshall's Defense of McCulloch v. Maryland* 1 (1969) (hereinafter "*Marshall's Defense*"). Some of those attacks were written by a man calling himself Amphictyon and believed to be a Virginia state judge, William Brockenbrough. He argued that under Marshall's view of what constituted "appropriate" legislation, "there is no limitation whatever" to congressional authority, which, he claimed, could well be used to prevent the States from doing such things as imposing land taxes. Id. at 66-67. Spencer Roane, a judge of the Virginia Supreme Court of Appeals, made similar arguments in a subsequent series of letters published in the same paper, under the name Hampden. Like Brockenbrough, Roane specifically criticized *McCulloch*'s authorization of "appropriate" legislation. Id. at 128, 135.

In a series of essays responding to Brockenbrough and Roane, Marshall defended *McCulloch* against the charge (among others) that the authority to pass "appropriate" legislation gave Congress unlimited power. For example, responding to the hypothetical posed by Judge Brockenbrough, he flatly denied "that a law prohibiting the state legislatures from imposing a land tax would be an 'appropriate' means . . . to be employed in collecting the tax of the United States." *Marshall's Defense* at 100. According to Marshall, the adoption of such an extreme measure would not be "plainly adapted" to the end of collecting federal taxes, but instead would indicate that Congress, " 'under the pretext of executing its powers,' " was really acting " 'for the accomplishment of objects not intrusted to the [federal] government.' " Id. (quoting *McCulloch*, 17 U.S. at 423). Moreover, relying upon contemporaneous dictionary definitions of the word "appropriate," he went on to explain that "means which are 'appropriate' . . . must 'directly and necessarily tend to

produce' " the end in question. Id. at 102; see also id. at 186, 189 (discussing meaning of "appropriate").[5]

During the ensuing 40 years, Marshall's "appropriateness" test for determining the existence of an implied congressional power—and for construing the Necessary and Proper Clause—was quoted and discussed in numerous legal commentaries. *E.g.*, 1 Story, *Commentaries on the Constitution* § 432, at 417 (1833); *New York* v. *Commissioners*, 67 U.S. 620 (1862).[6] Often his formulation, and his view of implied powers generally, were roundly criticized, especially by the most ardent state-rights advocates. *E.g.*, Niles Weekly Register, March 13, 1819, at 41-44, *reprinted in Great Lives Observed: John Marshall* 104-07 (Kutler ed., 1972)

Thus, by the time the Fourteenth Amendment was drafted and ratified in 1868, the phrase "appropriate legislation" had a well defined meaning: It referred to any legislation that would pass muster under the standard articulated in *McCulloch*. As discussed in more detail

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[5] In a later essay, Marshall warned that Congress' discretion to select "appropriate" legislation may not be "fraudulently used to the destruction of the fair land marks of the constitution. Congress certainly may not, under the pretext of collecting taxes, or of guaranteeing to each state a republican form of Government, alter the law of descents; but if the means have a plain relation to the end—if they be direct, natural and appropriate, who, but the people at the elections, shall, under the pretext of their being unnecessary, control the legislative will, and direct its understanding?" *Marshall's Defense* at 173.

[6] Later, the *McCulloch* standard came to be equated with "rationality" review, *E.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981); *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 488 (1955). However, as shown in the text, Marshall's own approach was considerably stricter than this. *See supra* pp. 10-11. There is substantial historical evidence, moreover, that the Necessary and Proper Clause has more restrictive force than is generally thought today. *See* Lawson & Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267 (1993).

below, that formulation placed substantial limits on congressional authority. However, because the *McCulloch* standard allows Congress to go somewhat *beyond* what is "indispensably necessary" to carry out an enumerated power or to pursue a constitutionally legitimate objective, the drafters (and ratifiers) of the Fourteenth Amendment plainly could not have meant to limit Congress' legislative options to those that were indispensably necessary to compel compliance with the requirements of that Amendment.

2. Section 5's history compels the same conclusion. On January 22, 1866, a special subcommittee of the Joint Committee on Reconstruction was established to draft what was to become the Fourteenth Amendment. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 37-38, 55-56 (1969). The Joint Committee considered several variations of what would become Section 5. Among them was the following proposal by Representative John A. Bingham, which the Joint Committee approved:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).

Id. at 61. Bingham presented the proposed amendment in the House on February 26, 1866. Cong. Globe, 39th Cong., 1st Sess. 1033-34 (1866). Both proponents and opponents of the Amendment believed it gave substantial lawmaking power to the Congress at the expense of the States. *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 1063-65 (1866) (statements of Sen. Hale); id. at 1082 (statement of Sen. Stewart); id. at 1095 (statement of Rep. Hotchkiss); id. at app. 133-35 (statement of Rep. Rogers). However, the principal attack on Bingham's proposal centered, not on the power it would give Congress to regulate state action, but on the fact that the proposal would give

Congress an unusually broad power to regulate private conduct, *i.e.*, it would give Congress authority to "pass uniform legislation in areas traditionally left to the states, such as marriage, property, and definition of crimes." Curtis, *No State Shall Abridge* 69 (1986). Accordingly, as Senator Stewart put it, the proposed amendment would "obviate the necessity of any more State legislatures" by giving Congress what amounted to a general police power. Id. at 70.

Because of this controversy, Congress postponed consideration of the proposed amendment. The Joint Committee then set about redrafting the amendment in late April. Kendrick, *supra*, at 83-115. On April 30, 1866, the Committee reported to Congress the text of what later became the Fourteenth Amendment. Cong. Globe, 39th Cong., 1st Sess. 2265, 2286 (1866). Section 5 of that proposal granted enforcement power to Congress, while Section 1 created disabilities on state action, thereby emphasizing that those disabilities are freestanding and do not require affirmative support by Congress. Curtis, *supra*, at 85. The revised article of amendment, moreover, was narrower than the original proposal, in that it reached *only* state action, not private action. Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Evans); id. at 2765 (statement of Sen. Howard); *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989). Accordingly, this version did not evoke the broad concern over possible congressional power to prescribe nationally uniform laws with respect to life, liberty, and property. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. app. 151 (1871) (statement of Rep. Garfield).

Section 5 also contained a different formulation of the scope of Congress' discretion to select the means it could use in carrying out the ends authorized by other sections of the Amendment. However, this difference was not significant. Bingham's original proposal had simply borrowed the phrase "necessary and proper" from Article

I, which *McCulloch* had interpreted as allowing Congress the power, not only to choose those means that are indispensable to carrying out one of the enumerated powers, but means that are "appropriate" to that end. See *supra* p. 11. Thus, there was no substantive difference between the "necessary and proper" formulation in Bingham's original proposal, and the "appropriate legislation" requirement of what became Section 5.

This fact—as well as the fact that "appropriate" was by then a term of art—is confirmed in subsequent remarks by Senator Thurman:

> What is meant by this term "appropriate legislation?" We know where the term comes from. We know it comes from an old opinion of Chief Justice Marshall, and was applied by him simply to the old provision of the Constitution that Congress has power to make all laws necessary and proper for carrying into effect the foregoing powers.

Cong. Globe, 41st Cong., 2d Sess. 602 (1870).

In short, both the language and history of Section 5 demonstrate that it gives Congress the power to adopt means that would be considered "appropriate" under the *McCulloch* standard, so long as the end being pursued falls within one of the Amendment's sections, and so long as the means chosen are directed at state action and do not violate some other constitutional restriction on Congress' power. Congress' discretion, although limited, was thus not restricted to those means that might be thought indispensably necessary to carry out a constitutional objective.

3. This conclusion is further confirmed by this Court's decisions interpreting Section 5 and similar provisions in the Thirteenth, Fifteenth, and Eighteenth Amendments. The seminal exposition of Section 5's requirements was provided in *Ex parte Virginia,* which held that the provisions of the Civil Rights Act of 1875 forbidding the exclusion of jurors on account of their race were within

Congress's power under Section 5 to enforce Section 1's "equal protection" guarantee:

> Whatever legislation is *appropriate*, that is, *adapted* to carry out the objects the amendments have in view, whatever *tends* to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

100 U.S. at 345-46 (emphasis added). Although the Court did not cite *McCulloch*, the language it used in explicating the term "appropriate" is obviously reminiscent of Marshall's definition of an "appropriate" means, *i.e.*, one that is "plainly adapted" to a constitutionally legitimate end, one which "directly and necessarily tends to produce" that end, and is not otherwise prohibited. See *supra* pp. 10-11; see also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325 (1966) (recognizing that *Ex Parte Virginia's* definition of "appropriate" is functionally identical to Marshall's). The similarities between the formulations are simply too striking to have occurred by accident. Thus, in its earliest interpretation of the operative phrase in Section 5, this Court implicitly recognized that this phrase was a term of art, and gave it the same well established meaning it had had ever since *McCulloch*.

Not surprisingly, the Court has upheld a variety of statutes that, although they "tend[ed] to enforce submission to the prohibitions" of the Fourteenth Amendment, were not "indispensably necessary" to that end. *Ex Parte Virginia* itself is a prime example. There, the Court held (1) that the right to a trial "by jurors indifferently selected or chosen without discrimination . . . because of their color" was an aspect of the right granted by Section 1 to "equal protection of the laws" (100 U.S. at 345), and (2) in pursuit of this constitutionally proper end, it was within Congress' power under Section 5 to prescribe criminal penalties, including imprisonment, for any State official, including a State judge who (as was alleged in that

case) excluded a juror on account of his race (id. at 345-48).

The dissent objected, in part, to the breadth of the means chosen by Congress to achieve the goal of preventing race-based exclusions, namely, the "exercise [of] coercive authority over judicial officers of the States in the discharge of their duties under State laws." Id. at 358 (Field, J., dissenting). The majority itself, moreover, alluded to an arguably narrower or less intrusive means by which Congress could have achieved its goal—simply "declar[ing] void any action of a State in violation of the prohibition." Id. at 345. Yet the Court nevertheless upheld Congress' chosen mechanism under Section 5 because, as noted above, it was "adapted to carry out" an end the Court found to be within Section 1, and "tend[ed] to enforce submission to the prohibitions" of that Section.

Respondent Flores' brief presents an excellent analysis of this Court's subsequent decisions construing Section 5, as well as identical provisions in the Thirteenth, Fifteenth, and Eighteenth Amendments. Without duplicating that analysis here, we note two conclusions that must emerge from any honest evaluation of those decisions.

First, in accordance with the standard articulated in *Ex Parte Virginia,* this Court has consistently and frequently upheld, as "appropriate legislation" under each of those Amendments, laws that went at least somewhat beyond what would have been indispensably necessary to effectuate the end specified in the Constitution. This is true whether the end sought to be served by the legislation was, for example, preventing the states from abridging voting rights based on race (*e.g., South Carolina* v. *Katzenbach; Oregon* v. *Mitchell,* 400 U.S. 112 (1971); *City of Rome* v. *United States,* 446 U.S. 156, 172-83 (1980); preventing the states from discriminating on the basis of sex in employment (*e.g., Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976)); or preventing the sale of intoxicating beverages during Prohibition (*e.g., National Prohibition Cases,* 253 U.S. 350, 387-88 (1920)). In at least two

such cases, moreover, this Court held that Congress has the power to adopt means under Section 5 which the Court had previously (or simultaneously) held were *not* indispensably necessary to the pursuit or achievement of the end that Congress sought to achieve. See *South Carolina* v. *Katzenbach* (upholding congressional ban on literacy tests even though the Court had previously held that literacy tests do not necessarily violate the Fifteenth Amendment); *City of Rome* (upholding law requiring preclearance of changes in voting practices with potentially discriminatory effects, even though the Court held the same day that electoral practices with discriminatory effects only do not violate the Constitution absent proof of discriminatory intent).

Second, these decisions by and large did not rest (and need not have rested) upon the broad conception of congressional power described in *Katzenbach* v. *Morgan.* There, the Court suggested (as part of an alternative holding) that Congress has discretion under Section 5, not only to choose the most appropriate means to pursue a particular end, but also to choose the end itself by adopting an expansive interpretation of a constitutional right. 384 U.S. at 652 (Congress can appropriately conclude that literacy tests themselves violate the Equal Protection Clause, even though the Supreme Court had previously held that such tests were not a violation of the Clause). Joined by Justice Stewart, Justice Harlan correctly objected to this reasoning as "[i]n effect . . . giving Congress the power to define the substantive scope of the [Fourteenth] Amendment." Id. at 668 (Harlan, J., dissenting). Notably, none of the Court's earlier (and later) decisions sustaining legislation under Section 5 relied upon any such sweeping power.

Instead, as shown below, those decisions have respected an important limitation upon Congress' exercise of the Section 5 power, namely, that the end Congress seeks to achieve in exercising that power be supplied, not by Congress itself, but by the Constitution. It is to the propriety of that restriction—and others—that we now turn.

B. Section 5 Does Not Authorize Congress To Attempt To Protect Rights Not Plainly Encompassed Within The Fourteenth Amendment; Adopt Remedies With An Insufficient Nexus To A Right Legitimately Protected By That Amendment; Regulate Purely Private Conduct; Trench Upon State Prerogatives Absent A Clearly Expressed Intent; Or Violate Other Provisions Of The Constitution.

Congress' Section 5 authority carries with it at least five internal limitations, all of which significantly restrict Congress' ability to intrude into the States' proper domain.

1. As already noted, and contrary to the suggestion in *Morgan*, Congress may not arrogate to itself the authority to determine the ends that it may pursue in the exercise of its Section 5 authority. Instead, its action must be directed at an end that fairly and legitimately falls within the text of the Fourteenth Amendment. This is so for several reasons.

First, by its very language, Section 5 gives Congress only the authority to "enforce" the guarantees of the Fourteenth Amendment, not to define their scope. And Congress is empowered to enforce only "the provisions" of that Amendment. This implies that, insofar as the Amendment gives rise to personal rights, Congress may enforce only those rights that fairly fall within the Amendment's text (including its incorporation of other express constitutional rights), not those derived—appropriately or not—from the Amendment's "penumbrae."[7] Moreover, given

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[7] Right or wrong, the notion that a provision of the Constitution can possess penumbrae that themselves give rise to enforceable rights is a product of the 20th Century. Accordingly, even if a prior judicial decision holds that a particular right, which does *not* fall fairly within the Fourteenth Amendment's text (or another constitutional provision incorporated by reference therein), nevertheless is protected under that Amendment, such a decision does not necessarily establish that Congress has authority under Section 5 to enact legislation in pursuit of that right. Thus, for example, the fact that this Court has recognized a qualified right to abortion in such decisions as *Roe* v. *Wade*, 410 U.S. 113 (1973), would not

the hostile congressional reaction to Rep. Bingham's original proposal (*supra* pp. 14-15), it is inconceivable that the Fourteenth Amendment would have passed Congress, much less have been ratified by the States, if it had allowed Congress either to define for itself the scope of the rights and disabilities created by the Amendment, or to "enforce" individual rights lacking a firm anchor in the Amendment's text.

Second, allowing Congress to "define the substantive scope" of the Amendment, as Justice Harlan put it in his *Morgan* dissent, would be contrary to the approach adopted in *McCulloch* and its progeny. *McCulloch* held that, to exercise an implied power, Congress must act in the service of an "end" that is "legitimate [and] within the scope of the constitution." 17 U.S. at 421. Similarly, *Ex Parte Virginia* treated the Amendment's "objects" and "prohibitions" as fixed, and not subject to enlargement by Congress. See 100 U.S. at 435-46. The same is true of this Court's other decisions construing Section 5, with the exception of *Morgan.*

2. The next limitation is the requirement that the legislation be "plainly adapted" to—and that it "directly and necessarily tend to produce"—the legitimate end at issue. As Chief Justice Marshall warned in *McCulloch,* a reviewing court can and should hold such legislation unconstitutional if it appears from the legislation itself that Congress "under the pretext of executing its powers, [has] pass[ed the] law[] for the accomplishment of ob-

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mean that Congress can use the Section 5 power to "enforce" that right.

In any event, even without overruling that decision (or others recognizing rights not firmly rooted in the text of the Constitution), this Court could well decline to extend its reasoning to the Section 5 context under ordinary principles of *stare decisis.* After all, overturning a decades-old Court decision could upset settled expectatons and reliance interests that simply do not attach to a newly enacted statute. *See, e.g., Planned Parenthood* v. *Casey,* 510 U.S. 1309 (1994) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.) (discussing importance of reliance interests in decision to apply *stare decisis*).

jects not intrusted to the government." 17 U.S. at 423. As examples, Marshall cited hypothetical federal laws altering inheritance laws and denying to the States the power to impose a general land tax. See *supra* p. 12.

Such scrutiny does not mean, of course, that a court should engage in a wide-ranging inquiry into the motives of individual memebers of Congress, much less of Congress as a body. *Cf. United States* v. *Darby*, 312 U.S. 100, 115 (1941) (noting impropriety of such an inquiry); *United States* v. *O'Brien*, 391 U.S. 367, 383-84 (1968) (same). However, if the means selected are so unrelated to the asserted end as to suggest that the statute was passed in furtherance of an end that falls outside the Fourteenth Amendment, the statute should not be deemed "appropriate legislation."

3. Congress also may not invoke Section 5 to justify legislation that reaches beyond state action to purely private conduct. Like the other limitations discussed above, this limitation serves the interests of federalism because it prevents Congress, in the words of Senator Stewart, from "obviat[ing] the necessity of any more State Legislatures." See Cong. Globe, 39th Cong., 1st Sess., at 1082 (1866). As discussed above, it was to avoid precisely this result that Congress rejected Representative Bingham's original proposal, which did not include an express "state action" requirement. See *supra* pp. 14-15.

That the Fourteenth Amendment (other than Section 4 relating to war debts) does not reach purely private conduct is demonstrated by an examination of its text. The key provisions of Section 1, for example, are phrased as disabilities on the States: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." See *Croson*, 488 U.S. at 490 ("Section one of the Fourteenth Amendment is an explicit constraint on state power"). Thus, the individual rights that are implied by Section 1 are rights as against

the States, not rights as against private citizens in the absence of some connection to state action. Although some Justices have occasionally suggested otherwise in the past,[8] this Court has consistently upheld and enforced Section 5's state action requirement. *Civil Rights Cases*, 109 U.S. 3, 11-14 (1883); *James* v. *Bowman*, 190 U.S. 127 (1903); *United Bhd. of Carpenters* v. *Scott*, 463 U.S. 825, 831 (1983); accord *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 606 (1990) (O'Connor, J., dissenting, joined by Rehnquist, C.J., Scalia, J., and Kennedy, J.).

4. Next, given that Section 5 was enacted against the backdrop of the Eleventh Amendment, if Congress intends to abrogate the States' sovereign immunity it must clearly state its intent to do so. *Gregory* v. *Ashcroft*, 501 U.S. 452, 469 (1991) (" 'we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment' ") (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 16 (1981)); see also *Dellmuth* v. *Muth*, 491 U.S. 223, 227-28 (1989) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor and Scalia, JJ.).

5. Finally, Congress lacks the power under Section 5 to adopt legislation that is otherwise "prohibited" by the Constitution. *McCulloch*, 17 U.S. at 423. Thus, petitioner and its *amici* are correct that Congress cannot use Section 5 to enact legislation that violates the constitutional separation of powers, or provisions of the Bill of Rights such as the Establishment Clause of the First Amendment. Congress likewise may not legislate under Section 5 in a way that violates rights protected by the Fourteenth Amendment itself. As Justice O'Connor has noted, Section 5 "grants Congress no power to restrict,

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[8] *District of Columbia* v. *Carter*, 409 U.S. 418, 423 n.8 (1973) (*dictum*); *United States* v. *Guest*, 383 U.S. 745, 762 (1966) (Clark, Black, and Fortas, JJ.); *id.* at 781-84 (Brennan, J., Warren, C.J., and Douglas, J.).

abrogate, or dilute these guarantees." *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 732 (1982) (O'Connor, J.); accord *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097 (1995) (holding that Section 5 does not give Congress the authority to "enforce" the Equal Protection Clause in favor of some citizens in a manner that violates the equal protection rights of others).

C. RFRA Falls Within Congress' Narrow Section 5 Power, Without Transgressing Its Limitations.

With these limitations firmly in mind, we now turn to a consideration of whether RFRA, as applied to the States, falls within Congress' power under Section 5. By its terms, the statute applies only to governmental action, and therefore easily satisfies Section 5's state action requirement. See 42 U.S.C. § 2000bb-3(a) ("This chapter applies to all Federal and State law, and the implementation of that law . . . ."). RFRA also clearly states its intention to abrogate the states' sovereign immunity. And, for reasons persuasively explained in the respondents' briefs, RFRA does not run afoul of the Establishment Clause.

Accordingly, the statute's validity depends upon (1) whether the end it seeks to promote falls within the scope of the Fourteenth Amendment, and (2) whether the means it uses satisfy Section 5's "appropriate legislation" requirement. As we now show, RFRA satisfies both of these crucial requirements.

1. There can be no question that RFRA furthers a constitutionally legitimate "end," namely, protecting the right to free exercise of religion articulated in the First Amendment. In RFRA's subtitle, the Act is expressly denominated "[a]n Act to protect the free exercise of religion." Pub. L. No. 103-141, 107 Stat. 1488 (1993). Similarly, the Senate Report, in discussing Congress' authority to enact RFRA, states that "the act is clearly designed to implement the free exercise clause," and that it was "intended to enforce the right guaranteed by the

free exercise clause . . . ." S. Rep. at 14 & n.43. Thus, the only real issue with respect to the "end" Congress sought to pursue in enacting RFRA is whether the right to free exercise of religion is a right that Congress can legitimately act to "enforce" against the States under Section 5. It is.

Certainly, the right to free exercise of religion fairly falls within the text—*i.e.*, a "provision"—of Section 1. That right is one of the "liberties" expressly protected against congressional intrusion by the text of the First Amendment. Accordingly, as this Court has held in *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), and its progeny, the right to free exercise of religion fits comfortably within Section 1's prohibition of state action that would "deprive [] [any person] of . . . liberty . . . without due process of law." *Id.* at 303; accord *Employment Div.* v. *Smith*, 494 U.S. 872, 876-77 (1990).[9]

The conclusion that the Fourteenth Amendment incorporates the Free Exercise Clause is confirmed by ample evidence that the drafters of Section 5 believed it would give Congress authority to enforce against the States the rights already guaranteed, as against congressional action, by the First Amendment. Senator Howard, who introduced the revised draft of the Fourteenth Amendment in the Senate, was most explicit on this point. Alluding to the existing lack of power on the part of Congress to enforce against the States the first eight Amendments to the Constitution, he stated: "[I]f they [the first eight Amendments] are to be effectuated and enforced, as they

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[9] On its face, the right to free exercise of religion fits even more comfortably within Section 1's prohibition on state action that would "abridge [a] "privilege[] or immunit[y] of citizens of the United States." U.S. Const. amend. XIV, § 1. The contrary conclusion in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), has been persuasively criticized on textual and historical grounds. See Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193 (1992).

assuredly ought to be, . . . additional power should be given to Congress to that end. This is done by the fifth section of this amendment." Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866). Similarly, Representative Bingham, who introduced the proposed amendment in the House, observed that Section 5 would "arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today." Id. at 1088; accord id. at 1072 (statement of Sen. Nye); id. at 1629 (statement of Rep. Hart). There were many statements to this same effect during the subsequent campaign for ratification by the State (see Curtis, *supra*, at 133-44 (collecting authorities)), and during subsequent Reconstruction Congresses. See Cong. Globe, 42d Cong., 1st Sess. app. 69 (1871) (statement of Rep. Shellabarger); id. at app. 84-85 (statement of Rep. Bingham). See also 2 Cong. Rec. app. 242 (1874) (statement of Sen. Norwood); id. at 384-85 (statement of Rep. Mills).[10]

2. The means adopted by RFRA for enforcing the Free Exercise Clause likewise satisfy Section 5's "appropriate legislation" requirement. As noted earlier, we assume that this Court's decision in *Smith* identified the outer bound-

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[10] That the Framers meant to give Congress the power to enforce the First Amendment (and other provisions of the Bill of Rights) against the States is hardly surprising in light of then-prevailing political considerations. Those considerations dictated that the goals of the Reconstruction Congresses with respect to the rights of former slaves, especially in the South, be wrapped in a broad and politically appealing agenda for securing the civil rights of all citizens, including a broad spectrum of individual liberties. James, *The Framing of the Fourteenth Amendment* 21-33 (1965). More specifically, as the brief for respondent Flores shows, the protection of religious liberty against the States was a central part of the Reconstruction agenda, owing to the fact that southern States had sometimes restricted religious meetings among slaves and deprived them of access to the Bible. *See* Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemption Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106, 1131-37, 1145-49 (1994).

aries of the limitations imposed upon States directly by the Fourteenth Amendment's incorporation of that Clause. On that assumption, RFRA concededly goes beyond merely compelling the States to comply with those requirements. However, as shown above, that alone has never been a basis to hold that Congress has exceeded its authority, whether Congress acts under the Fourteenth Amendment (as in *Ex Parte Virginia*), one of the other Reconstruction Amendments (as in *City of Rome* and *South Carolina* v. *Katzenbach*), or one of the powers enumerated in Article I (as in *McCulloch*). Rather, assuming the legislation does not run afoul of some external constitutional limitation, the question is always whether, in Chief Justice Marshall's formulation, the legislation is "plainly adapted" to its end, and "directly and necessarily tends to produce" it. See *McCulloch*, 17 U.S. at 421.

RFRA satisfies this test. As construed in *Smith*, the Free Exercise Clause, of its own force, provides important protections against certain kinds of State action:

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." . . . The government may not compel affirmation of religious belief, . . . punish the expression of religious doctrines it believes to be false, . . . impose special disabilities on the basis of religious views or religious status, . . . or lend its power to one or the other side in controversies over religious authority or dogma.

494 U.S. at 877 (citations omitted). Under *Smith*, moreover, the Free Exercise Clause protects, in at least some circumstances, religiously motivated "performance of (or abstention from) physical acts." Id. As to those, *Smith* recognized that "a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or

abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." Id.; see also *Church of Lukumi Babalu Aye* v. *Hialeah*, 508 U.S. 520 (1993) (applying this principle to invalidate local ordinance).[11]

Although RFRA adopted the "compelling interest" test that *Smith* held was not *mandated* by the Free Exercise Clause, Congress was well within its discretion in concluding that the adoption of this test was an "appropriate" means by which to enforce the requirements of that Clause. This is so for two reasons.

The first is deterrence. When it enacted RFRA, Congress had before it evidence that, without the constraint of the compelling interest test, governments could and sometimes would, in violation of those prohibitions recognized in *Smith*, deliberately discriminate against religious beliefs or practices under the cloak of a "neutral" or "generally applicable" law. See S. Rep. at 5 & n.3; H.R. Rep. at 2 & n.2. Witnesses testified that state legislators wishing to target a particular religion or a particular religious practice would "camouflage [their intention] in a law of general applicability." Religious Freedom Restoration Act of 1991: Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 102d Cong., 2d Sess. 105 (1992) (Statement of Nadine Strossen, President, National Board of Directors, ACLU). Indeed, that is essentially what this Court found that the local government in the *Hialeah* case had done, though somewhat ineptly. See 508 U.S. at 520. And in other contexts, this

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[11] *Smith*, on the other hand, held that the Free Exercise Clause does not, of its own force, (1) prevent governments from enacting generally applicable or "neutral" laws that incidentally burden religious exercise, or (2) require governments to justify such laws by showing that they are "narrowly tailored," in some sense, to the promotion of a "compelling government interest." 494 U.S. at 878-89.

Court has noted the risk of "subtle departures from neutrality" in the enactment or enforcement of state laws, *Gillette* v. *United States*, 401 U.S. 437, 452 (1971), and the distinct possibility of "covert suppression of particular religious beliefs," *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.).

Such suppression could of course operate to "punish the expression of religious doctrines [the government] believes to be false," "impose special disabilities on the basis of religious views or religious status," or even "ban . . . acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display"—as the Court found in the *Hialeah* case. 508 U.S. at 521. Any of those government actions would violate the Free Exercise Clause as construed in *Smith*.

RFRA's compelling interest test is "plainly adapted" to discourage such unconstitutional government actions, and obviously "tends" to do so, as the *McCulloch* test requires. The mere possibility that government officials may be called upon, in a court of law, to justify their actions obviously deters violations of the Free Exercise Clause. Certainly, Congress was within in its discretion in so finding. See *supra* p. 28.

The second reason is remediation. Congress concluded that, absent a compelling interest test, those whose constitutional free exercise rights have been violated would nevertheless "be forced to convince courts that an inappropriate legislative motive" was behind the statute or regulation at issue. H.R. Rep. at 6. Proving such a motive is notoriously difficult and necessitates intrusive, and often embarrassing, discovery. Id. Moreover, the necessity of proving such a motive will often mean that many violations of the Free Exercise Clause (again, as interpreted in *Smith*) will go unremedied.

Once again, RFRA's compelling interest test directly addresses this problem. If a governmental body surrepti-

tiously "punish[es] the expression of religious doctrines [the government] believes to be false, . . . impose[s] special disabilities on the basis of religious views or religious status" or bans physical "acts or abstentions . . . only because of the religious belief that they display," *Smith*, 494 U.S. at 877, RFRA allows the aggrieved party a remedy without engaging in protracted and intrusive litigation over legislative motives. In this regard, RFRA is no different from many other statutes designed to enforce other rights protected by the Reconstruction Amendments, and sustained by this Court under Section 5 and analogous provisions. *E.g., Oregon* v. *Mitchell; South Carolina* v. *Katzenbach.*

Simply put, RFRA's compelling interest test directly encourages all governments—federal, state, and local—to respect and adhere to the core prohibitions of the Free Exercise Clause, and directly assists in remedying violations where they occur. No objective could be more legitimate, and no legislation more "appropriate" to that end.

CONCLUSION

For the foregoing reasons, these *amici* respectfully urge this Court to affirm the decision of the Court of Appeals, and to hold that the Religious Freedom Restoration Act, to the extent it applies to the States, is a facially constitutional exercise of Congress' authority under the Fourteenth Amendment.

Respectfully submitted,

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